No. 15670

United States Court of Appeals

For the Ninth Circuit

NORTHWEST AIRLINES, INC., *Appellant,*

vs.

GERALDINE B. GORTER, as Administratrix of the Estate of John M. Waldrep, Deceased, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

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I.
STATEMENT OF THE CASE

A. The Facts

This suit is a wrongful death action brought on behalf of a child for the death of her father. The child was born three days after her father's death, and orphaned a few months later by the death of her mother. The deceased was, at the time of his death, a Sgt. First Class (R. 410) in the United States Army, returning home from Korea on emergency leave to be with his ailing wife at the birth of the child.

While appellant has not chosen to appeal from the findings of fact pertaining to its negligent conduct, appellee submits that for a proper understanding of the issues involved, particularly the conflict of laws

issues, a more accurate and detailed statement of the case is required.

On January 17, 1952, one of appellant's Douglas DC-4 aircraft departed Tokyo for the United States on the return portion of a flight originating at Seattle, Washington (R. 655). The aircraft was carrying 40 U.S. soldiers home from Korea for emergency leaves (R. 141). It crashed in the waters of Hecate Strait, off shore of Sandspit airstrip, British Columbia. This airstrip is located on the tip of an island 60 miles west of the British Columbia mainland (R. 1027) and is designated by appellant for use as an emergency landing strip.

Sgt. Waldrep was one of 35 soldiers and crew members who perished in the sea by freezing or drowning after the crash. This tragic loss was the culmination of an almost unbelievable chain of negligent acts and omissions by appellant airline, occurring over a period of three months in three different countries and over the high seas. While each one of the negligent acts and omissions could alone have been the proximate cause of the deaths, the sum total of these acts and omissions is appalling.

On October 19, 1951, a stock clerk in appellant's shops, at Seattle, Washington, failed to record the elapsed engine hour time on the aircraft's No. 1 engine, after receiving the engine from another airline company. The engine failed, necessitating the abortive attempt at an emergency landing. At that time it exceeded the Civil Aeronautics Board allowable operating time by more than 225 hours (R. 600-1) and showed

a shocking history of increasingly excessive oil consumption and extra maintenance (Pl. Ex. 30) (R. 639). Time and time again, in Seattle prior to departure, in Tokyo when picking up the soldiers, at Shemya, Alaska, where a magneto on the No. 1 engine had to be changed, and at the Anchorage Air Force Base, where the oil consumption between Shemya and Anchorage was shown to be increasing alarmingly (Pl. Ex. 30) (R. 597, 639), an alert inspector would have predicted its eventual failure. Apparently, however, no one gave it any thought until after the crash.

On January 17, 1952, appellant's personnel in Seattle prepared the aircraft for its flight to Tokyo and return to Seattle (R. 251, 695). They placed an inadequate amount of emergency over-water safety literature on board the aircraft at Seattle. The literature showed the life rafts to be stored in a *different* location than *actually was the fact* (R. 85).

After the final stop at Anchorage, Alaska, the aircraft departed for the State of Washington. Three hours later, in the early hours of January 19, 1952, midway between Anchorage and Seattle, the overdue No. 1 engine failed. The pilot radioed Seattle for instructions. Appellant's dispatchers and flight controllers failed to instruct the pilot or consult with or advise the pilot concerning landing conditions at the airstrip at Sandspit, B.C. (R. 85). Appellant's agents in Seattle neglected to alert rescue facilities in the area that an emergency landing was being made in adverse weather conditions on a snow-covered emergency field with which the pilot was unfamiliar (R. 87). Two hours

later the aircraft reached the vicinity of the airstrip and the pilot made one pass at the field but misjudged the available runway length. He attempted to become airborne again on three engines but crashed into the water at least one-half mile offshore (R. 83-85). To that moment, no one of appellant's crew had even bothered to wake up the passengers and advise them that an emergency landing was to be made or that an emergency existed (R. 141, 161). No instructions were given at any time to the passengers concerning the location or use of life vests (R. 139, 148). Although all of the crew and passengers survived the actual impact and were able to climb out of the aircraft, only a few found life vests. No emergency lights or signal flares were available and even though the crew desperately attempted to launch life rafts, they were not able to get any out of the aircraft (R. 1130).

One by one, during the ensuing two hours of total darkness, while the aircraft slowly settled in the sea, the passengers and crew dropped off into the near freezing waters (R. 147-9). Finally an airstrip attendant, who had become concerned when the aircraft failed to return after its one pass, roused a nearby resident. With a small row boat and an outboard motor they eventually located the wreckage in the darkness from the shouts of the seven survivors (R. 149). The boat was too small to carry the seven survivors. By clinging to the gunwales of the boat for the time that it took to reach shore, seven men were eventually towed to safety (R. 150, 1133).

B. Appellee's Theory of Case

The foregoing facts originally presented an interesting conflict of laws problem. However, now that the pleading and the testimony thereon are in the record, the solution of this case and its proper consideration is clear. Appellee submits and will support in detail throughout the following pages of her brief, that the proper conclusion must be reached by the following analysis.

The court found that the location of this accident was in the sea beyond low water. Appellant failed to either plead or prove any law, foreign or otherwise, applicable at that location, merely pleading that two sections of an act entitled Families' Compensation Act "could" apply. The uncontroverted testimony was, however, that said Act was not applicable seaward of low water mark (R. 1042, 1065-6). Therefore the court following the Washington rules of burden of proof and presumption, presumed the law applicable at this location to be the same as the law of Washington.

However, even if the accident had happened landward of the low water mark, Mr. Cunningham, the Chairman of the Maritime Law Subsection of the Canadian Bar Association for British Columbia and a member of the Air Law Subsection for British Columbia for the Canadian Bar Association (R. 1061), testified that under the law of British Columbia, a tort is deemed to be committed where the negligent acts take place and not necessarily where the injury is received.

> "The second reason is that even if the wrongful act or acts of negligence occurred above low

> water, under our law the tort is deemed to be committed where the wrongful acts take place and not necessarily where the injury is received. Even if the wrongful act or acts occurred in the air or in British Columbia, it would be my opinion in the facts stated, including the fact that the deceased was a United States citizen, the aircraft was a United States aircraft, and the corporate aircraft carrier was domiciled in the United States, that the court in British Columbia would apply the law of the United States." (R. 1066)

The deceased was a United States citizen; the aircraft a United States aircraft; and the corporate aircraft carrier was domiciled in the United States. Furthermore, as the primary acts of negligence occurred in the State of Washington, to-wit: the stock clerk's erroneous entry (R. 85), the placement of improper literature and inadequate safety equipment (R. 85), the Seattle radio operator's failure to advise the pilot and alert air-sea rescue services when the plane was in an emergency condition (R. 85); and further, as the aircraft was based in Washington and the flight originated and was to terminate in Washington, the appellant's maintenance facilities for its Western district (which includes Tokyo and the Territory of Alaska) are in Washington (R. 229), and furthermore, as the principal records and witnesses were in Washington, the suit was filed in Washington, and the Washington law would be applicable according to the British Columbia law.

Appellant has failed to sustain its burden to prove the application of any other law, foreign or otherwise, at the place of the accident. Hence a Washington court,

and in turn a federal district court in Washington, under such circumstances, must presume that the applicable law is the same as the Washington law.

II.
ARGUMENT IN SUPPORT OF JUDGMENT

A. Federal Courts Apply The Law of the Forum State As to Burden of Proof and Presumption

Evidently after appellant discovered it had failed in its burden to plead and prove either foreign law or the application thereof, it decided after the trial to rid itself of its failure by pushing the burden off to appellee. Thus, on appeal, appellant passes the buck, so to speak, and claims, contrary to the lower court's finding, that now appellee has the burden of proof of foreign law. Appellant asserted no such theory in its pleadings, by motion, nor during the trial, nor is such a position recognized in law.

Whatever appellant's reasons, it is clear that its theory is wrong. Appellant has failed to recognize in its argument, the rules of choice of law in the federal courts. Indeed, appellant founds its argument on a case, *Cuba Railroad v. Crosby,* 222 U.S. 473, 56 L.Ed. 744 (1912), which is not the federal law on the question of burden of proof and presumptions since the decision in *Erie v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

The lower court found herein, as a matter of fact, that the aircraft crashed seaward of the low water mark offshore of British Columbia. The court further found that appellant failed to properly plead or prove any

law applicable at that point. Thereupon it looked to the Washington law. In the absence of proper pleading and proof of other applicable law by appellant the district court, following the Washington rule, presumed the law to be the same as the Washington law. This is the correct application of the principle of *Erie v. Tompkins, supra.* In that decision the court said:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its legislature in a state or by its highest court in a decision is not a matter of federal concern." *Erie v. Tompkins,* 304 U.S. at 78.

Applying the *Erie* case, in *Sampson v. Channell,* 110 F.2d 754, 128 A.L.R. 394 (1st Cir., 1940), cert. denied, 310 U.S. 650, 60 S.Ct. 1099, 84 L.Ed. 1415, the court said:

> "But under the Tompkins case the Massachusetts law must be determined by the state statutes and the common law as interpreted by the state courts, not by the federal court's notion of 'general law'." (Massachusetts was the forum state.) *Sampson v. Channell,* 110 F.2d at 761.

Appellee will show by the following argument and authorities that the district court applied both the federal choice of law rule and Washington substantive rules of burden of proof and presumption properly.

Inasmuch as appellant has gone to such lengths to attempt to place this burden of proof of the law applicable at the point of the accident on appellee we must determine whether (1) the federal court is bound

to follow the state rules as to burden of proof and presumption of foreign law, and (2) what the state rule actually is as to burden of proof and the presumption.

The case of *Sampson v. Channell, supra,* is perhaps the landmark case dealing with the rule of *Erie v. Tompkins, supra,* as applied to presumption and burden of proof. In that case Judge Magruder explored the policy behind *Erie v. Tompkins, supra,* which is the necessity for reaching a uniform result between federal courts and the forum state. The court announced that the state court rule as to presumption and burden of proof must be applied by federal courts to reach the desired result of uniformity:

> "Inquiry must be directed to whether a federal court in diversity of citizenship cases, must follow the applicable state rule as to incidents of burden of proof." *Sampson v. Channell,* 110 F.2d at 754.
>
> ". . . the state rule as to burden of proof must be applied in diversity of citizenship cases . . ." *Sampson v. Channell,* 110 F.2d at 758.
>
> "Our conclusion is that the court below was bound to apply the law as to burden of proof as it would have been applied by the state courts in Massachusetts." *Sampson v. Channell,* 110 F.2d at 762.
>
> "Therefore, inasmuch as the *older decisions* in the federal courts, applying in diversity cases the federal rule as to burden of proof as a matter of 'general law,' are founded upon an assumption no longer valid since Erie Railroad Co. v. Tompkins, 204 U.S. 64, their classification as a matter of substance should be re-examined in the light of the objective and policy disclosed in the Tompkins

case." *Sampson v. Channell,* 110 F.2d at 756. (Emphasis added)

Since *Erie v. Tompkins,* the 9th Circuit has repeatedly stated that a federal district court must apply the forum state's law of burden of proof and presumption. Typical of the decisions are the following:

New York Life Insurance Co. v. Roger, 126 F.2d 784 (9th Cir., 1942) (State rule of burden of proving recovery under insurance policy applied);

Hagen v. Washington Water Power Company, 99 F.2d 614 (9th Cir., 1938) (State doctrine of *res ipsa loquitur* applied);

Equitable Assurance Society v. MacDonald, 96 F.2d 437 (9th Cir., 1938), cert. denied 305 U.S. 624, 83 L.Ed. 399 (Washington state rules of presumption and burden of proof as to fraudulent character of misrepresentations applied).

Since the *Erie* case the United States Supreme Court has repeatedly applied the same principle:

Bank of America National Trust & Savings Assn. v. Parnell, 352 U.S. 29, 77 S.Ct. 119, 1 L.Ed.2d 93 (1956);

Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943);

Cities Service Oil Co. v. Dunlap, 308 U.S. 208, 6 S.Ct. 20, 84 L.Ed. 196 (1939).

In other circuits the federal courts recognize the basic principles of federal and state conflict of laws. They have consistently applied the state rules of presumption of foreign law.

Sylvania Electric Products v. Barber, 228 F. 2d 842 (2nd Cir., 1956), cert. denied, 350 U.S. 988, 76 S.Ct. 475, 100 L.Ed. 854 (1956). (Federal court presumed Nebraska presumption of knowledge of danger same as Massachusetts);

Krasnow v. Nat'l Airlines, 228 F.2d 326 (2nd Cir., 1955). (Federal court presumed Florida law on duty of common carriers to be same as New York rule);

Peterson v. Chicago Great Western Ry. Co., 138 F.2d 304 (8th Cir., 1943). (Iowa law presumed same as Nebraska);

Adams Hat Stores v. Lafco, 134 F.2d 101 (3rd Cir., 1943). (Federal court presumed laws of New Jersey and Delaware to be the same as Pennsylvania);

Waggaman v. General Finance Co., 116 F.2d 254 (3rd Cir., 1940). (Federal court presumed Maryland law, where accident happened, to be same as law of Pennsylvania);

F.A.R. Liquidating Corp. v. Brownell, 130 F. Supp. 691 (D.C. Del. 1955);

Molina v. Sovereign Company, 6 F.R.D. 385 (D.C. Neb. 1957).

These foregoing principles are overlooked by appellant. Appellant relies solely on *Cuba Railroad v. Crosby, supra,* attempting throughout its brief to cast this burden of pleading and proof on the appellee. The *Cuba Railroad* case, *supra,* is a pre-*Erie v. Tompkins* case, no longer in point on the issues involved herein.

B. The Law in the State of Washington Is That the Burden of Proving Foreign Law Is on the Litigant Asserting a Law Different from the Law of the Forum State

Appellant has cited no Washington cases in its brief to support its assumption that appellee has the burden of proof of a foreign law. The reason for this is, of course, that the Washington court has consistently held that the party asserting application of a law *different from* that of the forum has the burden of pleading and proving that law. One of the first Washington cases to consider this point, and a case consistently cited thereafter, is *Clark v. Eltinge,* 29 Wash. 215, 69 Pac. 736 (1902). In that case the Supreme Court of Washington laid down the Washington rule emphatically that once the plaintiff has made out a *prima facie* case under Washington law, it is the burden of the defendant to assert by proper pleading and proof *any* foreign law relied on as a defense.

The defendant in *Clark v. Eltinge, supra,* urged exactly the same assertion to the Washington court as appellant asserts to this court. In fact, the Washington Supreme Court heard the case twice on the same issue because of the commission of the same error twice by the trial court. In the earlier decision and in the later decision, which is *Clark v. Eltinge,* 34 Wash. 323, 75 Pac. 866 (1904), the Washington Supreme Court ruled that the defendant, not the plaintiff, had the burden of pleading and proving the foreign law upon which it relied.

The case involved foreclosure of a Montana mortgage. Each of the two defendants claimed under Mon-

tana law the mortgage must be foreclosed and the proceeds applied upon the debt before the plaintiff stated a cause of action; and thus claimed it devolved upon plaintiff to plead and prove Montana law. The court said:

> " 'The action itself was a simple one. In order to put the respondents upon the defense, *it was enough* for the appellants to allege and prove the making and delivery of the note, their ownership of it, the fact that the respondents were husband and wife, and that the debt was a community debt *under the laws of this state.* Whether the note had been paid, in whole or in part, *or whether there were other legal reasons why the appellants could not recover, were matters of defense, which respondents must allege and prove in order to avail themselves of them. It did not devolve upon the appellants to negative such defenses in advance of their assertion.'*
>
> "We think the above language makes it clear, as the law of this case, that, when appellants had introduced their evidence, the nature of which conforms to the suggestions of this court, they were entitled to go to the jury. It was plainly stated that, when such proof was made, then, *if there were other legal reasons why recovery could not be had, they were matters of defense which respondents must allege and prove.*
>
> *"Respondents are making the defense that resort must be had to the law of Montana to determine whether appellants may recover in this action.* As a part of the defense, they claim that, under that law, the mortgage must have been foreclosed and the proceeds of the security applied upon the debt, before this action can be main-

> tained. They allege that this has not been done. *It is their duty to prove it, if they wish to avail themselves of it. As we said on the other appeal, they cannot require appellants to negative their defenses in advance of their assertion.*" *Clark v. Eltinge,* 34 Wash. at 328-30, 75 Pac. at 868. (Emphasis added)

The wife in the above case claimed as her separate defense that under Montana law, she was not responsible for the debts contracted by her husband who signed the note alone. The plaintiff pleaded and proved facts establishing a community debt *under Washington law.* The defendant wife did not allege or prove the appropriate Montana law to establish a defense. The court accordingly said:

> "The question, then, is, did the proofs [by plaintiff] make a *prima facie* case against her? . . . Had the transaction occurred in this state, the debt, unquestionably, would have been a community debt of the husband and whether it be the community debt of the husband and wife, or the separate debt of the husband, must be determined . . . by the laws of Montana. But these laws are not before us. We must therefore presume them to be the same as our own . . ." *Clark v. Eltinge,* 29 Wash. at 222-23, 69 Pac. at 738.

> "We think it properly devolves upon the respondent, who seeks to avail the presumption against her, to make that proof." *Clark v. Eltinge,* 34 Wash. at 328, 75 Pac. at 868.

The *Clark v. Eltinge* case, *supra,* has been consistently cited and relied on by the Washington Supreme Court from 1902 until the present. It stands for the

unimpeachable rule of Washington on the burden of pleading and proving foreign law and the consequences of failure.

Murrilla v. Guis, 51 Wash. 93, 98 Pac. 100 (1908);

Colpe v. Lindblom, 57 Wash. 106, 106 Pac. 634 (1908);

Snyder v. Stringer, 116 Wash. 131, 198 Pac. 733 (1921).

Murrilla v. Guis, supra, affirmed on rehearing, 57 Wash. 564, 107 Pac. 378 (1910), is unquestionably in point. The facts are simplified as follows: Plaintiff, a woman, brought an action in a Washington court for seduction which took place in Alaska while both parties resided there. Plaintiff alleged only the fact showing the seduction and also the place of the wrong — Alaska. Plaintiff did not plead any Alaska statute granting a cause of action for seduction. A verdict for the plaintiff was appealed. As in this appeal, appellant argued that the appellee had the burden of pleading and proving an appropriate Alaska statute giving appellee a cause of action for seduction. The Washington Supreme Court held that it was not appellee's burden to plead or prove the Alaska law as a basis of her claim. No other law having been proved to the contrary by appellant, the court presumed the Alaska law to be the same as the Washington seduction statute.

Other Washington decisions following the rule that the party asserting application of a foreign law different from that of the forum, has the burden of pleading and proving that law are:

Allen v. Saccomanns, 40 Wn.2d 283, 242 P.2d 747 (1952);

Archilles v. Hooper, 40 Wn.2d 664, 245 P.2d 1005 (1952);

Laughlin v. March, 19 Wn.2d 874, 145 P.2d 549 (1944);

Walnut Park Lumber & Coal Co. v. Roane, 171 Wash. 362, 17 P.2d 896 (1933);

Wamsley v. Rostad, 150 Wash. 192, 272 Pac. 722 (1928);

Tatum v. Marsh Mines Consolidated, 108 Wash. 367, 184 Pac. 628 (1919);

Marston v. Rue, 92 Wash. 129, 159 Pac. 111 (1915);

Fletcher v. Murray Commercial Co., 72 Wash. 525, 130 Pac. 1140 (1913);

Pitt v. Little, 58 Wash. 355, 108 Pac. 941 (1910);

Colpe v. Lindblom, 57 Wash. 106, 106 Pac. 634 (1910);

Gasaway v. Thomas, 56 Wash. 77, 105 Pac. 168 (1909);

Mantle v. Dabney, 44 Wash. 193, 87 Pac. 122 (1906);

Daniel v. Gold Hill Mining Co., 28 Wash. 411, 68 Pac. 884 (1902);

Gunderson v. Gunderson, 25 Wash. 459, 65 Pac. 791 (1901);

Lowry v. Moore, 16 Wash. 476, 48 Pac. 238 (1897).

C. The District Court Properly Presumed the Foreign Law To Be the Same as the Statutory Law of Washington

Appellant asserts most vehemently that the "federal rule" is that there is no presumption that statutory law of a foreign country or state is the same as that of the forum (Appellant's Brief 59-61), and again relies on the pre-*Erie v. Tompkins* case of *Cuba Railroad v. Crosby, supra.* As additional authority appellant quotes from the Restatement of Conflict of Laws, Section 623. Evidently appellant neglected to look to the Washington annotations to the Restatement. The Washington Annotations to Section 623 state:

> "Sec. 623 Foreign Statutory Law:
>
> "*Contra.* After a period of uncertainty . . . the court adopted the rule that the statutory law of another state will be presumed to be the same as that of this state in the absence of pleading and proof to the contrary." (Citing cases on three pages.) American Law Institute, Restatement of the Conflict of Laws, Washington Annotations, Section 623.

The Washington decisions holding the courts will presume statutory law are too numerous to discuss in detail:

Walnut Park Lbr. & Coal Co. v. Roane, 171 Wash. 362, 17 P.2d 896 (1933);

Lino v. Hole, 159 Wash. 16, 291 Pac. 1079 (1930);

Rubin v. Dale, 156 Wash. 676, 288 Pac. 233 (1930);

Dailey v. Dailey, 154 Wash. 499, 282 Pac. 830 (1929);

Bock v. Siefert, 143 Wash. 4, 253 Pac. 1081 (1927);

Williams v. Great Northern Railway Co., 108 Wash. 344, 184 Pac. 340 (1919);

Tatum v. Marsh Mines Consolidated, 108 Wash. 367, 184 Pac. 628 (1919);

Freyman v. Day, 108 Wash. 71, 182 Pac. 940 (1919);

Marston v. Rue, 92 Wash. 129, 159 Pac. 111 (1916);

Plath v. Mullins, 87 Wash. 403, 151 Pac. 811 (1915);

German American Bank of Seattle v. Wright, 85 Wash. 460, 148 Pac. 769 (1915);

Fletcher v. Murray Commercial Co., 72 Wash. 525, 130 Pac. 1140 (1913);

Canadian Bank of Commerce v. Sesnon Co., 68 Wash. 434, 123 Pac. 602 (1912);

Sheppard v. Coeur d'Alene Lbr. Co., 62 Wash. 12, 112 Pac. 932 (1911);

Pitt v. Little, 58 Wash. 355, 108 Pac. 941 (1910);

Colpe v. Lindblom, 57 Wash. 106, 106 Pac. 634 (1910);

Gasaway v. Thomas, 56 Wash. 77, 105 Pac. 168 (1909);

Murrilla v. Guis, 51 Wash. 93, 98 Pac. 100 (1908);

Lilly-Brackett Co. v. Sonnemann, 50 Wash. 487, 97 Pac. 505 (1908);

Mantle v. Dabney, 44 Wash. 193, 87 Pac. 122 (1906);

Clark v. Eltinge, 34 Wash. 323, 75 Pac. 866 (1904);

James v. James, 35 Wash. 655, 77 Pac. 1082 (1904);

Clark v. Eltinge, 29 Wash. 215, 69 Pac. 736 (1902);

Daniel v. Gold Hill Mining Co., 28 Wash. 411, 68 Pac. 884 (1902);

Gunderson v. Gunderson, 25 Wash. 459, 65 Pac. 791 (1901).

See also:

Note, *Presumptions as to Foreign Law — Common Law & Statutory Law,* 5 Wash. L. Rev. 78 (1930).

Bearing in mind the well-recognized policy behind the *Erie v. Tompkins* rule, that is, that in diversity cases there shall be uniformity between the federal court and the particular state court wherein the suit is brought, the lower court recognized that the Washington rule as to presuming foreign statutory law is applicable herein.

Because the presumption of foreign law rule is a substantive conflict of laws rule, the possibility of non-uniformity between state and federal diversity actions, no longer exists since the case of *Klaxon Company v. Stenton Electric Manufacturing Co.,* 313 U.S. 487, 61 S.Ct. 1021, 85 L.Ed. 1477 (1941). In conformity with *Erie v. Tompkins, supra,* Mr. Justice Reed said:

"We are of the opinion that the prohibition de-

> clared in Erie Railroad v. Tompkins [cite] against such independent determination by the federal courts extends to the field of conflict of laws. The conflict of laws rules to be applied by the federal court in Delaware must conform to those in Delaware state courts." *Klaxon v. Stenton Electric Company,* 313 U.S. at page 496.

Note also:

> *Alcaro v. Jean Jordeau,* 138 F.2d 767 (3rd Cir., 1943).

For the reasons stated above, the question of probabilities warranting a presumption asserted by appellant is immaterial (Appellant's Brief 61-62). The Washington presumption rule is not dependent upon some abstract principle of probabilities. Clearly, it is a substantive rule of law, standing on its own right. The label "presumption" merely describes the effect of the rule. Since *Erie v. Tompkins,* federal courts will not judge the wisdom of state rules of law.

D. Washington Applies the Presumption to Foreign Country Statutory Law

Appellant erroneously claims the court cannot apply the presumption to the statutory laws of a foreign country such as Canada (Appellant's Brief 60). The simple answer to this contention is that Washington courts have presumed the laws of a foreign country, including British Columbia, to be the same as the laws of Washington, both common and statutory.

> *Dailey v. Dailey,* 154 Wash. 499, 282 Pac. 830 (1929). (Statutory jurisdiction of divorce court in Mexico, presumed to be same as that of Washington);

Fletcher v. Murray Commercial Co., 72 Wash. 525, 130 Pac. 1140 (1913). (Bankruptcy law of China presumed to be the same as that of United States);

Pitt v. Little, 58 Wash. 355, 108 Pac. 941 (1910). (British Columbia law presumed to be the same as Washington Negotiable Instruments Act);

Gasaway v. Thomas, 56 Wash. 77, 105 Pac. 168 (1909). (British Columbia law of fixtures presumed to be same as Washington law);

Daniel v. Gold Hill Mining Co., 28 Wash. 411, 68 Pac. 884 (1902). (British Columbia corporations act presumed to contain no more than Washington act).

See also:

20 Am. Jur., Evidence, Sec. 181, Page 187, on the indulgence of the presumption to Canadian laws.

E. The Statutory Presumption Applies Whether or Not a Comparable Foreign Statute Is Shown to Exist

Appellant attempts to make an argument to the effect that the Washington presumption does not operate "unless the provisions of a foreign statute [are] shown to exist . . ." (Appellant's Brief, 60--1, 62-3). In making the argument the appellant also asserts that a right of action, if any, would be unknown to common law at the place the death occurred. In such assertion appellant completely ignores the well recognized requirement that foreign law, or lack of it, is a fact, like any other fact, and must be proved in evidence. Thus,

if appellant had wished to rely on such argument it was obligatory on it to prove either or both of these two facts.

Appellant's reference to the Canadian case of *Young v. Industrial Chemical Co.,* 2 WWR 468, is extremely improper. Neither this case nor the statute cited thereafter were offered in evidence, or testified to for construction, or found as a fact. They were merely cited in appellant's proposed post-trial amendments (R. 61, 66-9) which were denied.

Thus to answer appellant's contentions, appellee would also assume facts not in evidence, which procedure appellee finds improper.

However, the simple answer to the argument that the foreign statute must be shown to exist before the presumption operates is simply to cite *Murrilla v. Guis, supra,* where the Washington court presumed Alaska law to be the same as the Washington statute providing a cause of action for seduction. Neither party in that action pleaded or proved an Alaska statute permitting an action for seduction. Regardless, the court said:

> "It is maintained by appellant that, if such an action can be entertained by the courts of this state, it must be by authority of a statute where the offense was committed. The respondent did not plead a similar statute, or any statute, permitting such an action in Alaska, but she invokes the rule that, in the absence of proof to the contrary, the court will presume that the law of Alaska is the same as that of this state. In Clark v. Eltinge [cite] this court held that the above rule of pre-

sumption applies to statutory, as well as to common law. That decision is directly in point and is controlling here." *Murrilla v. Guis,* 51 Wash. at page 98, 98 Pac. at 102.

Besides the *Murrilla case,* there is a long list of decisions in Washington where the court presumed community property statutes, where *in fact* none were shown to exist in the foreign jurisdictions.

Lino v. Hole, 159 Wash. 16, 291 Pac. 1079 (1930);

Rubin v. Dale, 156 Wash. 676, 288 Pac. 233 (1930);

Marston v. Rue, 92 Wash. 129, 159 Pac. 111 (1916);

Plath v. Mullins, 87 Wash. 403, 151 Pac. 811 (1915);

Colpe v. Lindblom, 57 Wash. 106, 106 Pac. 634 (1910);

Mantle v. Dabney, 44 Wash. 193, 87 Pac. 122 (1906);

Clark v. Eltinge, 34 Wash. 323, 75 Pac. 866 (1904);

Clark v. Eltinge, 29 Wash. 215, 69 Pac. 736 (1902);

Gunderson v. Gunderson, 25 Wash. 459, 65 Pac. 791 (1901).

Appellee agrees there is no Washington decision presuming the provision of a wrongful death statute, because the question has never arisen in the state. However, another jurisdiction has considered the question,

and made the presumption as to a wrongful death statute, under circumstances very similar to this case. Appellee respectfully invites the court's attention to the case of *Grow v. Oregon Short Line,* 44 Utah 160, 138 Pac. 398 (1913). In the *Grow* case, the plaintiff was injured and died in Idaho. Utah was the forum. Both Utah and Idaho had wrongful death acts. The plaintiff pleaded the Idaho act and defendant pleaded a later Idaho statute which was a defense to plaintiff's cause of action. Plaintiff then amended his complaint deleting reference to the Idaho act altogether. Defendant did not properly reassert its plea of defense in its new answer. Thus, the court was aware of the Idaho act and the defense; but since the Idaho act was not relied on by plaintiff or properly pleaded and proved in defense by defendant, the court granted plaintiff recovery under the Utah death act. The court presumed the Idaho act to be the same as that of the forum, in accordance with the proper rule.

F. The Application of the Presumption by the District Court Did Not Give the Washington Statute Extra-Territorial Effect

The argument of appellant that wrongful death statutes have no extraterritorial effect (Appellant's Brief 40-5) is immaterial. The district court did not give the Washington statute extraterritorial effect. The court looked to the place of the injury, finding, under the evidence before it that the crash occurred seaward of low water mark, and then finding no law to the contrary

proved applicable, it presumed the law of that place to be the *same* as the Washington statute.

Assuming only for argument appellant's position that the evidence showed the accident happened landward of low water mark, the Washington law was still applicable. As Mr. Cunningham of the British Columbia Bar testified in rebuttal:

> "The second reason is that even if the wrongful act or acts of negligence occurred above low water, under our law the tort is deemed to be committed where the wrongful acts take place and not necessarily where the injury is received. Even if the wrongful act or acts occurred in the air or in British Columbia, it would be my opinion in the facts stated, including the fact that the deceased was a United States citizen, the aircraft was a United States aircraft, and the corporate aircraft carrier was domiciled in the United States, that the court in British Columbia would apply the law of the United States." (R. 1066)

Under either state of facts the Washington law was applicable. This is not extraterritorial application.

The procedure followed by the lower court with respect to the presumption is precisely consistent with the Washington cases cited above, where the same immaterial argument was made to the Washington State Supreme Court. See *Murrilla v. Guis,* 51 Wash. at 98, 98 Pac. at 102. The procedure also is strictly in accord with the mandate of the United States Supreme Court, requiring federal application of the state rules of conflict of laws. *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 618 S.Ct. 1021, 25 L.Ed. 1477 (1941).

III.

REBUTTAL OF APPELLANT'S SPECIFICATIONS OF ERRORS AND APPELLANT'S REMAINING ARGUMENTS

Appellant's specifications of errors and arguments appear to be directed primarily to the following points: (A) the court's finding that the accident occurred seaward of low water mark; (B) the court's finding that appellant failed to sustain its burden of proof; and (C) the court's finding as to damages and the amount of the judgment. In addition, appellant offers certain other arguments which are hardly worth extended rebuttal but are, nevertheless, discussed herein under the heading (D) Remaining Arguments of Appellant.

A. The Court's Finding That the Accident Occurred Seaward of Low Water Mark

Appellant presented its case and devoted the greater part of its brief to the question of whether the accident occurred seaward or landward of the low water mark. Mr. Cunningham testified that even if the accident had occurred landward of low water mark British Columbia courts would look to the place of the negligent acts and apply United States law. Furthermore, Mr. Cunningham's testimony was undisputed that the British Columbia Families' Compensation Act would not apply to an accident occurring seaward of low water mark (R. 1065-6). The court, however, made a finding that the accident occurred seaward of low water mark and appellant specifies this finding to be in error.

Appellant quotes the testimony of only one of its witnesses in support of its position that the accident

occurred landward (Appellant's Brief 23). That sole witness was Mr. Donald Leonard, who appellant introduces to this court as Regional Safety Engineering Chairman for the Airline Pilots Association (Appellant's Brief 22). Appellant neglects to mention that Mr. Leonard has been an employee of Northwest Airlines since 1944 and has been a Captain of Northwest Airlines about six years (R. 960-1). The portion of Mr. Leonard's testimony relied on by appellant pertains entirely to the location of the disintegrated airplane in June, 1952, after five months of heavy seas, tidal action and salvage towing operations (Appellant's Brief 23, 24). Even this witness testified that a few days after the accident, salvage operations were attempted by hooking onto the aircraft with some fishing boats (appellant misquotes his witness as testifying "a fishing boat," Appellant's Brief 24), and towing on it for approximately six hours (R. 993).

In support of the court's findings, appellee respectfully directs the court's attention to some of the testimony of other witnesses, who testified concerning the aircraft's location. For example:

(1) Mr. Dudley Cox, Manager of Flight Operations for appellant at the time of this accident reached the scene of the crash within 18 to 24 hours after the accident. He testified that:

> "A. The fact that one life raft was protruding from the astradome of the aircraft, the top of the fuselage and could be seen as we *passed over the airplane in a boat in the water, could see the raft and was easily* identified, plus the fact that one of

the survivors at McChord General Hospital stated —'' (R. 814) (Emphasis added)

Further:

''A. It appeared so, we observed the top of the fuselage. The tail section was torn off, we thought through a towing operation, *but we could see the top of the fuselage and the tops of the wings under the water.* It did appear from that view substantially intact.'' (R. 647) (Emphasis added)

And also,

''A. We couldn't state that positively. Some rafts were recovered. We saw one sticking out the navigator's dome. That was there and it washed up on shore, to my knowledge. I found that one myself.

Q. How long after the crash did that wash up?

A. Three or four days.

Q. At that time, the aircraft had begun to disintegrate due to the tidal action and the weather, isn't that correct?

A. That is correct.'' (R. 667)

Mr. Cox testified that two or three days following the crash:

'' . . . There was a low tide at night and we did attempt to walk to the wreckage at that point. The CAB did not go out. They considered it too hazardous. Some of us did go out, tried to walk.

'' . . . it was at night. We attempted to get on board the wreckage. We could not do so.'' (R. 636)

(2) Mr. Paul Sanders, a Director of Line Maintenance and ground services for Northwest Airlines on January 19, 1952, was immediately directed to the scene of the crash. He testified that:

"Q. Did you inspect the aircraft?

A. As much as was possible under the circumstances.

Q. Can you estimate how far the aircraft was located from the south end of the runway?

A. It is my guess, or my recollection, that the aircraft was . . . something in the vicinity of half a mile from the beach.

Q. From your investigation, had the aircraft withstood the impact of the water well?

A. Yes, I think it had.

Q. Was there or was there not substantial damage apparent?

A. Well, there was some fairly substantial damage apparent to the left wing of the aircraft, the left outer wing of the aircraft. There was some damage to the nose of the aircraft. Of course, during the ensuing three or four days, additional damage was done by the changing of the tide, but at the time, this is the damage that I recall. This was the day we arrived.

Q. Was any attempt made to tow the aircraft?

A. Prior to my arrival, apparently there had been an attempt made by some individuals on the scene to try—to attempt to beach the airplane by towing it around the point, so-called, Sandspit Point." (R. 953-4)

He testified that as part of the investigation divers were used:

"Q. Was that observation confirmed or refuted by the inspection made by divers who went underwater?

A. Yes. Sometime during the ensuing week, we

secured the assistance of some RCAF, Royal Canadian Air Force divers, and at my direction one of these divers checked the two nacelles on the aircraft, and which the two main landing gears are stowed when they are retracted, and the observations there indicated that both of these landing gears were in the nacelles, in the up position." (R. 856)

Mr. Sanders was one of the Northwest Airlines personnel who attempted to row around the aircraft to inspect the damage on January 21, 1952. They rendered a report as follows:

"Q. You testified that the aircraft when you flew over was in substantially good condition. You rendered a lengthy report after you returned from Sandspit and it was signed by you, do you recall that report?

A. The report was submitted to the CAB as part of our activities during the course of the investigation.

Q. Do you recall the statements set forth there, captioned Monday, January 21, 1952:

" 'Although the sea was running fairly heavy an observation crew consisting of Northwest Airline personnel, Mathews, Sanders, Cox, Leonard, a boatman and one member of the Royal Canadian Mounted Police rowed around the aircraft for a period of time in an attempt to observe the amount of damage to the aircraft. The aircraft by this time had broken into two separate pieces. The break occurred at a station immediately forward of the main entrance door. *The aft section had moved approximately 100 yards east of the forward section.* Not much else could be determined, and the party

returned to shore. During this time, another party while searching the beach at low tide found a complete nose wheel assembly had broken loose from the aircraft and had been washed up to where it was recoverable at low tide.'

"Do you recall that report?

A. That indicated the condition of the airplane on Monday." (R. 916-7) (Emphasis added)

Mr. Sanders' testimony is extremely interesting in connection with Mr. Leonard's testimony relied on by appellant. Mr. Leonard testified that from the appearance of the aircraft in June that it had not moved substantially, from the time of the accident in January. This, in spite of the facts of the many efforts to salvage the aircraft between the time of the accident and June, 1952, and in spite of Mr. Sanders' report and testimony that two days after the accident the aircraft broke in two and one part (the aft section) had *moved 100 yards away* from the other section.

(3) H. D. Maynard, one of the surviving passengers, and one who testified in person at the trial of the proceedings, stated that he and 6 other survivors of a total of 43 passengers and crew were rescued by a small boat which reached the scene of the crash and was able to tow the survivors to the shore. He testified that it took about 15 minutes to tow the survivors from the point of rescue to the shore by means of an outboard motor (R. 150). Lt. Donald Baker testified similarly.

(4) Richard Pontius Fields, the third surviving passenger testified that immediately after the crash:

"As I went out of the emergency hatch and upon reaching the outside I stepped off the back of the

starboard wing and went under water, and at that time I lost my life preserver. . . .

"I went under water above my head; how deep, I cannot determine." (R. 1160)

The foregoing are but a few of the many, many pages of testimony and items which justified the court in finding that the accident occurred seaward of low water mark. It is submitted that this finding of fact is obviously justified under the circumstances and that the questionable testimony of Mr. Leonard, relied on by appellant, on page 23 of appellant's brief pertaining entirely to the appearance of the aircraft's remains in June, could never rebut the vast preponderance of evidence of many other witnesses, including the officers of appellant's own company.

B. The Court's Finding That Appellant Failed to Sustain Its Burden of Proof

Appellee has already argued in Part II of this brief that the court was correct in applying the Washington rules of burden of proof and presumptions, in view of the fact that appellant failed to sustain its burden of proof as to a foreign law as a defense.

Appellant's attack on the lower court's application of the Washington rules of burden of proof and presumption of statutory law appears to be primarily one of estoppel. Thus, under the main heading of "F. Presumption as to Foreign Law Is Not Basis for Recovery" (Appellant's Brief 48-59) appellant argues that appellee has never relied on any foreign law and therefore should be estopped from relying on any foreign law or presumption. The answer to this is, of course, that

appellee never relied on a foreign law as a basis for recovery except insofar as it may be presumed that the law at the place of the accident is the same as the Washington law.

Appellee is at a loss to understand the basis for appellant's unsupported statement that unless one *relies* on foreign law, the presumption does not operate (Appellant's Brief 49). Objective assertion and reliance is not required under Washington or *any* law. In fact, *not one* of the Washington Supreme Court cases, cited by appellee above, requires such a condition to the application of the presumption. There is no such rule.

The basis of any rule of estoppel is reliance and a change of position. Appellant was never misled. The very day after the crash appellant sent its own men to investigate every minute facet of what happened. Dudley S. Cox, Manager of Flight Operations, Paul H. Sanders, Assistant Manager of the Inspection Division, and Donald Leonard, Captain and pilot, all viewed the exact location of the aircraft in the water the next day (R. 630, 853, 964). They rowed around it, they searched the beach, they tried to salvage the plane, they knew every detail two years before this action was brought. Again, they returned in June, 1952, to search, investigate and learn why and where their aircraft ditched.

Bearing in mind the obligations of burden of proof inherent in the present case, it might be well at this point to show how and in what sequence the evidence was presented to the court at the trial. At the very outset appellee pleaded the Washington Wrongful Death Act, locating the accident at "less than a mile off

shore in the waters of Hecate Strait, British Columbia" (R. 5). At this time, appellant knew full well where the aircraft crashed, whether inside or outside low water mark. Appellee's allegation that the accident happened "off shore in the waters of Hecate Strait, British Columbia" (R. 5) was not a conclusive allegation of jurisdiction. It was a simple geographical reference for the sole purpose of identification. Indeed, appellee's requests for admissions (R. 37, 38) referred to by appellant (Appellant's Brief 17) established only that J. M. Waldrep was a "passenger," and he "died" in the crash.

In answer to the complaint, appellant denied the applicability of the Washington Wrongful Death Act, but pleaded no alternative law, foreign or otherwise. If appellant intended to rely on any law contrary to that of Washington it was its duty to set that out (*Clark v. Eltinge, supra, et seq.*). Having visited the scene of the crash, appellant knew where the crash took place. To say that appellee changed position and appellant was misled is untrue.

Again, two full years before trial, appellee filed a memorandum advising appellant not only that foreign law might apply, but warned that if appellant intended to claim a particular foreign law as a defense, proper pleading was necessary, or appellant must suffer the consequences. Appellee said in this memorandum:

> "However, even if the court conceives that it should apply the law of British Columbia, Canada, this would not be ground for dismissal of Count I. The law of British Columbia, Canada, not being pleaded it is presumed that the law of British Co-

> lumbia, Canada, is the same as the law of the State of Washington. This presumption goes as well to the statute law of Canada as it does to the common law." (R. 21-2)

In addition to the above statement, appellee called appellant's attention to four decisions in support thereof (R. 22).

Over three years after the complaint was filed, and two years after the above notice of appellee's theory and intentions, and less than one month before trial, appellant amended its answer denying the applicability of the Washington Wrongful Death Act, alleging that the appellee "could" have brought its action under Sections 3 and 5 of the Families' Compensation Act (R. 42-3, 45-7). In opposition to appellant's pre-trial amendment once again appellee's counsel reminded appellant of appellee's intentions and theory of the case (R. 44):

> "The plaintiff's position was disclosed to the defendants over a year ago, as the records and file herein disclose, by memorandum of the plaintiff contra defendant's Motion to Dismiss which called the court's attention to the fact that defendant had not pleaded the British death act and that therefore the law of forum governs according to the well-known rules of law of this jurisdiction." (R. 45)

Apparently appellant felt strongly that its only chance to prevail was to invoke the British Columbia Families' Compensation Act, and that in order so to do it must positively identify the place of the crash as landward of low water mark. Thus on appellant's case in chief it called a Mr. John Bird, a British Columbia lawyer to testify as to the applicability of Sections 3

and 5 of the Families' Compensation Act. He admitted that the Province of British Columbia extended to low water mark but that there is no judicial pronouncement as to the ownership of land between ordinary low water mark and a point three miles seaward (R. 1042). This witness was followed on appellant's case in chief by a Mr. Joseph M. Kildall, whose testimony was directed entirely to the question of where the low water mark was at this point. By the progression of its own testimony in its case in chief appellant was well aware that a necessary requirement for the applicability of the British Columbia Families' Compensation Act was that the accident must occur landward of low water mark.

Appellee offered one witness in rebuttal, Mr. Cunningham. In answer to the following hypothetical question, Mr. Cunningham gave the following answer:

> "Q. I will ask you to assume that in January, 1952, a United States airplane operated by a United States corporation, Northwest Orient Airlines, Inc., pursuant to a contract with the United States Government, Department of the Air Force, left Japan with passengers for the United States, and after leaving Anchorage, Alaska, attempted to make an emergency landing at the airstrip at Sandspit, British Columbia, but instead crashed into open water at a point approximately one-half to three-quarters of a mile from shore; and ask you to assume further that one of the passengers, a United States citizen, died, leaving surviving a wife and an infant child; and assume further that the said death was caused by the wrongful act or acts of the carrier, Northwest Airlines, Inc.; and assume further that the administratrix of the de-

ceased's estate brought an action for and on behalf of the said child; do you have an opinion as to whether or not Sections 3 and 5 of the Families' Compensation Act of British Columbia would apply to this state of facts?

A. I have.

Q. What is that opinion?

A. The Witness: No, your Honor, my opinion is that the said Act would not be applicable." (R. 1061, *et seq.*)

Then again, at page 1066 of the record, Mr. Cunningham testified:

"The second reason is that even if the wrongful act or acts of negligence occurred above low water, under our law the tort is deemed to be committed where the wrongful acts take place and not necessarily where the injury is received. Even if the wrongful act or acts occurred in the air or in British Columbia, it would be my opinion in the facts stated, including the fact that the deceased was a United States citizen, the aircraft was a United States aircraft, and the corporate aircraft carrier was domiciled in the United States, that the court in British Columbia would apply the law of the United States. Also—" (R. 1066)

Thus, at this point, the district court had no other law or laws contrary to the Washington Wrongful Death Act before it. Appellant had neither pleaded or proved, in relation to the place of injury, the application of any law as a fact, the application of no law as a fact, or the application of any fact sufficient to sustain its burden.

It is difficult, of course, to keep in mind that a "law"

(foreign) is "fact" because normally the two are separate in legal thinking. Thus, the normal meaning of the word "law" is apt to influence one's thinking when an incongruous treatment is accorded it. This distinction that (foreign) "law" is treated as a simple "fact," must constantly be reminded to one's thinking to avoid subtle semantical confusion.

Thus, the district court had to follow the Washington rule and presume the law at the place of the crash to be the same as the Washington Wrongful Death Act.

> "The question, then, is, did the proofs [by plaintiff] make a *prima facie* case against her? . . . whether it be the community debt of the husband and wife, or the separate debt of the husband, must be determined . . . by the laws of Montana. *But these laws are not before us. We must therefore presume them to be the same as our own . . .*" *Clark v. Eltinge,* 29 Wash. at 222-23, 69 Pac. at 738. (Emphasis added)
>
> "We think it properly devolves upon the respondent, who seeks to avoid the presumption against her, to make that proof." *Clark v. Eltinge,* 34 Wash. at 328, 75 Pac. at 868.

In support of its so-called estoppel and reliance theory, appellant places great reliance on the case of *Peterson v. Chicago Great Western Ry. Co.,* 138 F.2d 304 (8th Cir., 1943). Appellee has no criticism of this case. At the outset of its opinion, the court, affirming the judgment of a Federal District Court for the District of Nebraska, stated:

> "Under the Nebraska conflict of laws rule, *lex loci delicti* governs generally the basic rights and

> substantive incidents of actions brought in that state to recover damages for personal injuries sustained in another state. *If such foreign law is not pleaded and proved, however, the Nebraska courts, like most states, apply the presumption that it is the same as the law of Nebraska." Peterson v. Chicago Great Western Ry. Co.,* 138 F.2d 305. (Emphasis added).

The court, recognizing the general rule, applied an Iowa statute to the facts because both parties by their pleading, trial memoranda, proof and instructions to the jury, relied on the statutes and laws of Iowa. It wasn't until the close of the case that the plaintiff changed his position and mentioned Nebraska (forum) law. In the instant case, however, the appellee consistently relied on the presumption of Washington law in its pleading, arguments, memoranda and proof. How can appellant seriously claim any surprise at this time? The other cases cited by appellant in support of its so-called estoppel theory (Appellant's Brief 53) are completely irrelevant and do not consider the matters at issue.

In assessing appellant's obligations and burden, the federal courts, following the *Erie* doctrine, will look to Washington court rules and attitude. Since 1894 Washington courts have constantly adhered to the principle of refusing to strain facts or law in aid of the defense of time limitations. The most recent reiteration of the Washington rule for assessing the burden of proof of one asserting such a technical defense is stated in *Wickwire v. Reard,* 37 Wn.2d 748, 226 P.2d 192 (1951) at page 759.

> "Underlying our appraisal of the issues before us is the long-standing rule in this state that the statute of limitations, although not an unconscionable defense, is not such a meritorious defense that either the law or the facts should be strained in aid of it." (Citing cases)

See also accord:

Cannavina v. Poston, 13 Wn.2d 182, 124 P.2d 787 (1942);

Bain v. Wallace, 167 Wash. 583, 10 P.2d 226 (1932);

Hein v. Forney, 164 Wash. 309, 2 P.2d 741, 78 A.L.R. 631 (1931);

Morgan v. Morgan, 10 Wash. 99, 38 Pac. 1054 (1894).

To give credence to appellant's argument would not only be contrary to law, but would be the very straining of interpretations condemned by the Washington court.

Even appellant's pleading as to foreign law was grossly insufficient. Besides asserting a defense that a foreign statute "could" be applicable (R. 46), appellant alleged no foreign decisions construing the statute, alleged no provisions relating to the facts of the case, set out only two sections of an act it relied on, and pleaded only appellant's own conclusions of its effect. At no time did appellant allege the Families' Compensation Act to be an exclusive remedy, or one under which the appellee must of necessity proceed.

Foreign law must be pleaded in all particulars so as to enable a court to judge its effect on the case at bar.

The City of Atlanta, 17 F.2d 311 (D.C. Ga. 1927);

Coronet Phosphate Co. v. United States Shipping Co., 260 Fed. 846 (S.D.N.Y. 1917);

Rodale v. Grimes, 211 Ga. 50, 84 S.E.2d 68 (1954);

Equitable Life Assur. Soc. v. Brandt, 240 Ala. 260, 198 So. 595 (1940).

41 Am. Jur., Pleading, Sec. 13.

As a required part of proper burden of pleading and proof, appellant must show the foreign law (whatever it is) governs the right of appellee, and that the act controls such right to the exclusion of all other law which might be applicable. The Families' Compensation Act was either exclusive or it was not; appellant either had a defense or did not. There is no "in between" position.

Appellant asserted by its own allegation "*could* have been based," that other laws might govern appellee's right of action; and, therefore, admitted the British Columbia Families' Compensation Act was not the sole and exclusive remedy upon which appellee could rely.

The applicable rule is stated in the *City of Atlanta* case, *supra.* Here a libelant pleaded in *haec verba* all the provisions of an alleged applicable Cuba statute. As in the present case, libelant did not allege whether the Cuba act covered the entire subject to the exclusion of the general maritime law. The court held:

> "The obligation is on libelant, when he relies upon the law of a foreign country, where the supplies were furnished or the services rendered, to plead and prove such law . . . (citing cases). If such law was intended to cover the entire subject, to the exclusion of the General maritime law, it

should be so pleaded and proven." *The City of Atlanta,* 17 F.2d at 311. See also, *MacCauley v. Hyde,* 114 Vt. 198, 42 A.2d 492 (1945).

Appellant pleaded only two sections of the British Columbia Families' Compensation Act, Sections 3 and 5. All other sections for possible interpretation were omitted. All other law of Canada in construing or applying the Act was omitted. All other law of Canada or British Columbia relating to the place of the crash was omitted. Application of any law or an application of no law to the area seaward of low water mark was omitted. With none of these facts pleaded or proved, the district court properly resorted to the ordinary presumption.

Appellant alleged no facts to show appellee's right of action came within the two sections of the Families' Compensation Act appellant pleaded. It may be that the Act under British Columbia law was meant to apply only to residents of British Columbia injured in British Columbia, or only to residents of British Columbia injured from acts of negligence occurring in the province. It may be the Families' Compensation Act under British Columbia law was meant only to govern actions brought in British Columbia courts, and not to govern rights of American citizens flying in American aircraft. As Mr. Cunningham testified in rebuttal:

> "Even if the wrongful act or acts occurred in the air *or in British Columbia,* it would be my opinion in the facts stated, including the fact that the deceased was a United States citizen, the aircraft was a United States aircraft, and the corporate aircraft carrier was domiciled in the United

States, that the court in British Columbia would apply the law of the United States." (R. 1066)

Appellant's only allegation as to the legal effect of the Families' Compensation Act was that the Act which "could" have been applied

> " . . . requires dismissal of plaintiff's complaint for failure to state a cause of action, that said statute's provisions bars this action." (Amendment to Paragraph IX of Defendant's Answer by interlineation) (R. 46)

This above statement of asserted effect was a mere conclusion of appellant's opinion, not a fact showing the status and effect of the foreign law.

In *Coronet Phosphate Co. v. United States Shipping Co.,* 260 Fed. 846 (S.D.N.Y. 1917), involving certain restraints placed on shipments to Sweden and Holland by Great Britain and her allies, Judge Learned Hand stated:

> "This allegation is certainly bad as it stands . . . *I do mean to say that in pleading foreign ordinances having the force of law the pleader is bound to allege more than his conclusion of the effects of the ordinance . . .*" *Coronet Phosphate Co. v. United States Shipping Co.,* 260 Fed. at 847. (Emphasis added)

> "It is generally held that averring the pleader's conclusions as to the legal effect of the foreign statutory law, is an improper manner of pleading it." 134 A.L.R. 571 at p. 573. For other cases so holding see 134 A.L.R. at 574 and 580; 41 Am. Jur., Pleading, Sec. 15.

> "The law is matter of fact, which must be pleaded with the certainty that any extrinsic fact must

be pleaded, which is essential to a right of action, or to constitute a defense. The pleader may be well satisfied of his construction of the foreign law, and may assert it as the law itself, that is not his province." *Cubbedge, et al., v. Napier,* 62 Ala. 518 (1878)

C. The Court's Finding as to Damages Was Obviously Justified

It is refreshing to find in appellant's argument on this point that it recognizes the application of Washington law. In support of its argument, it then refers (Appellant's Brief 63) to *Kramer v. Portland-Seattle Auto Freight,* 43 Wn.2d 386, 261 P.2d 692 (1953), and states the rule to be:

> "It is fundamental, in cases such as this, that the measure of damages is the pecuniary loss sustained by the beneficiaries for whose benefit the action is prosecuted."

Characteristic of appellant's argument, however, the quote is quite incomplete. In sustaining a $50,000 verdict on behalf of a husband and a two and one-half-year-old child for the death of the wife, the court in the quoted case stated that a judgment for wrongful death may be said to be excessive under the following circumstances:

> " . . . the balancing factor is the conscience of the appellate court, when there is an affirmative showing that passion and prejudice played no part in the jury's determination. Is the amount flagrantly outrageous and extravagant? . . ." *Kramer v. Portland-Seattle Auto Freight,* 43 Wn.2d at 396.

In the same case the court states that in awarding damages to a minor child the trier of fact may

> " . . . take into consideration . . . the loss of 'love, care, protection, services, guidance and moral and intellectual training and instruction' suffered by him. . . . This loss may follow him beyond the period of minority." *Kramer v. Portland-Seattle Auto Freight,* 43 Wn.2d at 397.

And again, in the same case, the court wisely observed:

> " 'We are also keenly cognizant of the fact that the purchasing power of money is less today than it was ten, fifteen, or twenty years ago.'
>
> " . . . in fact, the purchasing power of money is now considerably less than half what it was a few years ago." *Kramer v. Portland-Seattle Auto Freight,* 43 Wn.2d at 398.

Characteristically also the appellant attempts to cite and compare an award of $1,000 to the parents of a 21-year-old girl as an authority (Appellant's Brief 64). None of the cases cited by appellant, along with the obviously inapplicable case above referred to are comparable in either fact or time. Each was decided prior to 1939.

Cases on damages are legion. If for present purposes authority be needed to support the award a more comparable case would be *Boise-Payette Lumber Co. v. Larsen,* 214 F.2d 373 (9th Cir., 1954). In that case a $75,000 verdict to a wife and surviving child was sustained.

The present case was tried to the court sitting without a jury. Obviously no claim of passion or prejudice can be made. The court saw the child, heard the wit-

nesses and particularly had the benefit of the aunt's testimony, in whose home the child resides. The court recognized that the child was deprived of a father's care, every vestige of support, paternal love, paternal guidance, paternal intellectual training and instruction, and all that fatherhood entails and means. What then is the "conscience of the appellate court?" *Kramer v. Portland-Seattle Auto Freight,* 43 Wn.2d at 396. Is the amount "flagrantly outrageous and extravagant?" *Kramer v. Portland-Seattle Auto Freight,* 43 Wn.2d at 396. Or is the home a father could provide, support he could give, and his love, care and guidance well within the amount dispassionately found by the trial court. The answer is obvious. In no circumstance could the award be considered "flagrantly outrageous and extravagant" and patently, it is well within the "conscience of the court."

D. Remaining Arguments of Appellant

Appellant has brought up several points in argument throughout its brief which appellee feels are minor in nature and not worthy of extended argument.

1. Cost of Transcript

For example under the heading "Cost of Unnecessary Portion of Transcript and Record Should Be Taxed Against Appellee" (Appellant's Brief 72) appellant argues that appellee should be taxed costs of $903.68 for refusal to stipulate to the exclusion of testimony of certain witnesses. The testimony of these witnesses related to the acts of negligence and misconduct of Northwest Airlines. Appellant itself made reference to the questions of where the acts and omissions in

question took place (Appellant's Brief 34-5). Furthermore, in view of Mr. Cunningham's testimony that a British Columbia Court would, as a matter of law, apply the law of the place where the negligent acts took place, this testimony was essential.

2. Prior Adjudication

Appellant makes reference to the case of *Northwest Airlines, Inc., v. Geraldine B. Gorter, as Administratrix of the Estate of John W. Waldrep, Deceased,* 49 Wn.2d 711, 306 P.2d 213 (1957), claiming that it represents a prior adjudication that the accident occurred in British Columbia. In the first place, that case was instituted on a petition by appellant airlines to revoke appellee's Letters of Administration. The court decided in favor of Geraldine B. Gorter, appellee in these proceedings. The same issue would have been presented to the court had the accident occurred anywhere beyond the borders of the State of Washington. Furthermore, there are certain well-recognized rules of law which completely answer appellant's argument. For example, there is the general rule that one relying upon the doctrine of *res judicata* must plead the prior adjudication. If the estoppel is not pleaded the court is not only not bound to notice it, but is not permitted to consider or take notice thereof. 30 Am. Jur. Judgments 984, Sec. 255, citing many cases. Even in the few jurisdictions in which prior pleading is unnecessary, proof at trial of the subsequent action is necessary. In addition, all courts recognize that a judgment rendered on any grounds which do not involve the merits of the main action may not be used for the operation of the doctrine of *res judicata.* Note, *In re Clifford,* 37 Wash. 460, 76

Pac. 1001 (1905), and *Davies v. Metropolitan Life Ins. Co.,* 191 Wash. 459, 71 P.2d 552 (1937).

3. Washington "Borrowing" Statute

Appellant cites a statute R.C.W. 4.16.290 entitled "Foreign statutes of limitation, how applied" (Appellant's Brief 38) as authority for the proposition that a cause of action arising in another jurisdiction and there barred by lapse of time, cannot be maintained in this state. Obviously, if the foreign statute purportedly pleaded as a defense is found by a court not to apply, as in this case, it will not be "borrowed" in whole or part by the court of the forum. Furthermore, as is apparent from a reading of the statute, it only applies when the cause of action is between non-residents of this state. The plaintiff in this case is a resident of the State of Washington.

CONCLUSION

Appellant raises no question on this appeal as to its own negligence. Nor does it question that such negligence caused the death of Sgt. Waldrep. Thus, we are here concerned with a United States citizen on duty in the Armed Forces of the United States, bound for the United States on a United States plane operated by a United States carrier, who was killed in an emergency landing outside the United States occasioned by negligent acts occurring in the United States and elsewhere. The action is brought in a United States court by a United States citizen on behalf of a United States beneficiary.

To avoid liability for its negligence in such a case the law places a strong and well-recognized burden on the appellant, to-wit: to sustain the burden of pleading and proving an applicable law different from the law of the forum as applied by the forum court. That appellant has failed in its burden was readily recognized by the trial court and is clearly evident on the record.

An abortive attempt was made to plead and prove a British Columbia statute entitled Families' Compensation Act. Even this pleading and proof failed to assert or prove that under British Columbia law the British Columbia Families' Compensation Act was the sole remedy available to the appellee. Rather the evidence was to the contrary. The court found, moreover, and the British Columbia experts on British Columbia law testified, that this statute had no application to the situs of the accident. Yet no proper attempt was made by the appellant to plead or prove any other law or to

so locate the accident as to make another law controlling.

No attempt at nice or specious approaches to well-settled principles of conflict of laws can supply these deficiencies. Rather such approaches emphasize the soundness of the rules themselves and support the correctness of the trial court in their application.

It is submitted that the trial court reached the only conclusion warranted by sound, well recognized, and peculiarly applicable legal principles and that the judgment for the benefit of Sgt. Waldrep's now orphaned daughter should be affirmed.

Respectfully submitted,

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